No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, *et al.*,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

ANSWER TO BILL OF COMPLAINT

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The State of North Carolina ("North Carolina"), Defendant, pursuant to the Order of this Court of June 16, 2003, for its answer to the Bill of Complaint ("Complaint") filed by the State of Alabama, the State of Florida, the State of Tennessee, the Commonwealth of Virginia, and the Southeast Interstate Low-Level Radioactive Waste Management Commission ("the Commission"), states:

1. North Carolina admits the averments set forth in Paragraph 1 of the Complaint.

2. North Carolina admits the averments set forth in Paragraph 2 of the Complaint on information and belief.

3. North Carolina admits the averments set forth in Paragraph 3 of the Complaint on information and belief.

4. North Carolina admits the averments set forth in Paragraph 4 of the Complaint on information and belief.

5. North Carolina admits the averments set forth in Paragraph 5 of the Complaint on information and belief.

6. North Carolina denies the averments set forth in Paragraph 6 of the Complaint for the reason that the Southeast Interstate Low-Level Radioactive Waste Management Compact, Pub. L. No. 99-240, Tit. II, 99 Stat. 1859 (1986) ("the Compact"), speaks for itself.

7. North Carolina admits that it was a party to the Compact prior to its withdrawal on July 26, 1999. North Carolina denies all other averments set forth in Paragraph 7 of the Complaint.

8. North Carolina admits that this Court has original and exclusive jurisdiction of all controversies between two or more States. North Carolina denies that the Court has original and exclusive jurisdiction over the Commission's claim because North Carolina denies that the Commission is equivalent to a State for purposes of such jurisdiction and because North Carolina asserts its sovereign immunity from claims by the Commission.

9. North Carolina admits that North Carolina was a member of the Compact prior to its withdrawal on July 26, 1999. North Carolina admits that North Carolina was designated a host State for the development of a low-level radioactive waste disposal facility. North Carolina denies all other averments set forth in Paragraph 9 of the Complaint.

10. North Carolina admits the averments set forth in Paragraph 10 of the Complaint.

11. North Carolina admits the averments set forth in Paragraph 11 of the Complaint.

12. North Carolina denies the averments set forth in Paragraph 12 of the Complaint for the reason that the Compact speaks for itself.

13. North Carolina denies the averments set forth in Paragraph 13 of the Complaint for the reason that the Compact speaks for itself.

14. North Carolina denies the averments set forth in Paragraph 14 of the Complaint for the reason that the Compact speaks for itself.

15. North Carolina denies the averments set forth in Paragraph 15 of the Complaint for the reason that the Compact speaks for itself.

16. North Carolina denies the averments set forth in Paragraph 16 of the Complaint for the reason that the Compact speaks for itself.

17. North Carolina denies the averments set forth in Paragraph 17 of the Complaint for the reason that the Compact speaks for itself.

18. North Carolina admits that it was designated by the Commission as the second host State in September 1986. North Carolina denies all other averments set forth in Paragraph 18 of the Complaint.

19. North Carolina admits that its General Assembly created the North Carolina Low-Level Radioactive Waste Management Authority ("the Authority") by virtue of its enactment of Chapter 850 of the 1987 Session Laws on August 14, 1987. Chapter 850 of the 1987 Session Laws expressly conditioned North Carolina's continued membership in the Compact upon the enactment of legislation before December 31, 1988 by every party State specifically amending the Compact agreement concerning the right of a party State to withdraw, and by Congress consenting to this amendment before December 31, 1992. North Carolina denies all other averments set forth in Paragraph 19 of the Complaint for the reason that Chapter 850 of the 1987 Session Laws speaks for itself.

20. North Carolina admits that the Commission adopted a resolution on February 9, 1988, creating a "State Assistance Trust Fund" to provide financial assistance to any State designated as the next host State. North Carolina denies all other averments set forth in Paragraph 20 of the Complaint for the reason that the Commission's Resolution speaks for itself.

21. North Carolina admits the averments set forth in Paragraph 21 of the Complaint upon information and belief.

22. North Carolina admits that in October 1989, upon the recommendation of its Finance Committee, the Commission adopted a "Capacity Assurance Charge" on all current southeastern generators using the Barnwell, South Carolina disposal facility ("the Barnwell facility") to provide funding to support the licensing phase of the proposed North Carolina site. North Carolina denies all other averments set forth in Paragraph 22 of the Complaint.

23. North Carolina admits that in July 1990 the Authority adopted a revised work plan prepared by Chem-Nuclear Systems, Inc. (CNSI), the current operator of the Barnwell facility and the Authority's contractor for the North Carolina facility, that the plan included a revised estimated completion date for and cost of the project, and that the Commission was notified of these revised estimates at its meeting on August 23, 1990. North Carolina denies all other averments set forth in Paragraph 23 of the Complaint.

24. North Carolina admits that in November 1990, upon the recommendation of its Finance Committee, the Commission established an "Access Fee" collected from generators based upon the proportional volumes of waste originating in each of the member States to be disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 24 of the Complaint.

25. North Carolina admits that the Authority notified the Commission in October 1991 of a revised estimated completion date for the project. North Carolina denies all other averments set forth in Paragraph 24 of the Complaint.

26. North Carolina admits that in June 1992 the South Carolina Legislature voted to allow the Barnwell facility to remain open as the regional disposal site until January 1, 1996. North Carolina denies all other averments set forth in Paragraph 26 of the Complaint.

27. North Carolina admits that in September 1992, upon the recommendation of its Finance Committee, the Commission adopted an access fee to be charged to the generators of out-of-region waste to be disposed at the Barnwell facility ("Import Fee" or "Out-of-Region Access Fee"). North Carolina denies all other averments set forth in Paragraph 27 of the Complaint.

28. North Carolina admits that in November 1992, upon the recommendation of its Finance Committee, the Commission established an access fee to be levied on all low-level radioactive waste generators located in the States belonging to the Compact. North Carolina denies all other averments set forth in Paragraph 28 of the Complaint.

29. North Carolina admits that in April 1994 the Commission granted the Authority's request for advancement of funds from the Regional Access Fee to be paid out of the Compact's share of the Out-of-Region Access Fee collected from generators of out-of-region waste disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 29 of the Complaint.

30. North Carolina admits the allegations of Paragraph 30 of the Complaint.

31. North Carolina admits that the Commission received information at its meeting on August 26, 1994 indicating an increase in the estimated time required for Division

of Radiation Protection of the North Carolina Department of Environment, Health and Natural Resources ("DRP") to review the license application for the North Carolina disposal facility submitted in December 1993 by CNSI. North Carolina further admits that at its meeting on November 16, 1994 the Commission was presented information indicating that DRP had submitted 594 interrogatories to CNSI in an attempt to obtain analyses necessary to assure protection of public health and safety and the environment. North Carolina denies all other averments set forth in Paragraph 31 of the Complaint.

32. North Carolina admits that in December 1994 the Authority approved an additional one-year extension for the licensing process. North Carolina denies all other averments set forth in Paragraph 32 of the Complaint.

33. North Carolina admits that the Commission met twice in May 1995 to consider two separate motions proposed by South Carolina to sanction North Carolina by excluding waste generated in North Carolina from disposal at the Barnwell facility until such time as North Carolina issued a license for a new facility. North Carolina denies all other averments set forth in Paragraph 33 of the Complaint.

34. North Carolina admits the allegations of Paragraph 34 of the Complaint.

35. North Carolina admits that South Carolina's withdrawal from the Compact eliminated the Commission's ability to levy fees and surcharges on waste disposed at the Barnwell facility. North Carolina denies all other averments set forth in Paragraph 35 of the Complaint.

36. North Carolina admits that in January 1996 the Chairman of the Commission advised that at some point in the future Commission funds would no longer be available to North Carolina for site development expenses. North Caro-

lina denies all other averments set forth in Paragraph 36 of the Complaint.

37. North Carolina admits that in June 1996 Governor James B. Hunt, Jr. informed the Commission that North Carolina was not prepared to assume a greater portion of the project costs and that the licensing effort would not be able to proceed if the Commission was not willing or able to continue funding. North Carolina denies all other averments set forth in Paragraph 37 of the Complaint.

38. North Carolina admits that the Commission received a report at its meeting on June 18, 1996 which indicated that the Authority had adopted a Licensing Work Plan further extending the time for review of the license application and requiring additional field work to address lingering concerns over adequate protection for public health and safety and the environment, including proper site configuration, infiltration, and drainage. North Carolina denies all other averments set forth in Paragraph 38 of the Complaint.

39. North Carolina admits that in October 1996 the Commission authorized the release of funds to the Authority to cover amounts expended by the Authority in performing the work described in the Licensing Work Plan dated May 31, 1996. North Carolina denies all other averments set forth in Paragraph 39 of the Complaint.

40. North Carolina admits that in April 1997, upon the recommendation of its Monitoring Committee, the Commission voted to release additional funds in the amount of $2.9 Million to the Authority.

41. North Carolina admits that in July 1997, upon the motion of its Vice-Chairman, the Commission voted to approve additional funding to the Authority for the months of August and September of up to $1.4 Million.

42. North Carolina admits that in August 1997, upon the recommendation of its Monitoring Committee, the Commis-

sion authorized additional stop gap funding to the Authority through November 30, 1997 of up to $1.2 Million.

43. North Carolina admits that in 1997 the Commission organized a Task Force For Facility Funding comprised of volunteer representatives of the Authority, the Commission, waste generators, and the public. North Carolina denies all other averments set forth in Paragraph 43 of the Complaint.

44. North Carolina admits that in August 1997 the Commission submitted a draft Memorandum of Understanding prepared by the Southeast Compact Electric Utilities Generators Group ("the Generators Group") which proposed that participating generators would loan funds to the Authority for use in the site development and licensing process, and that in November 1997 the Commission informed North Carolina that if North Carolina had not reached an agreement in principle with the Generators Group by December 1, 1997 the Commission would not be able to continue funding the Authority's site development activities beyond November 30, 1997. North Carolina denies all other averments set forth in Paragraph 44 of the Complaint.

45. North Carolina admits that in a letter dated December 19, 1997 the Chairman of the Authority indicated that, because the Commission and the other member States had failed to honor their commitments under the Compact and made further performance by the Authority impossible, the Authority had determined that it had no alternative but to commence the orderly shutdown of the disposal facility project pending the Commission's reversal of its funding position or the receipt of other instructions from the North Carolina Legislature. North Carolina denies all other averments set forth in Paragraph 45 of the Complaint.

46. North Carolina admits that in January 1998 the Commission notified the Authority of its position that the project shut down constituted "a breach of contract law . . .

by North Carolina." North Carolina denies all other averments set forth in Paragraph 46 of the Complaint.

47. North Carolina admits that it engaged in informal "mediation" with the Commission but that no resolution to the funding impasse between the Commission and the Authority was reached during the period between January 1998 and April 1999. North Carolina denies all other averments set forth in Paragraph 47 of the Complaint.

48. North Carolina admits that in a letter dated April 26, 1999 the Commission stated its "belief" that North Carolina was in violation of the Compact and requested that North Carolina provide a written plan and schedule for a regional disposal facility. North Carolina denies all other averments set forth in Paragraph 48 of the Complaint.

49. North Carolina admits that on June 21, 1999 the Commissioners representing the State of Florida and the State of Tennessee filed a "Sanctions Complaint" with the Commission. North Carolina denies all other averments set forth in Paragraph 49 of the Complaint for the reason that the "Sanctions Complaint" speaks for itself.

50. North Carolina admits that, consistent with the express provisions of Article VII of the Compact and North Carolina General Statute §104F-5, it withdrew from membership as a party State in the Compact as of July 26, 1999 pursuant to the enactment of Chapter 357 of the 1999 Session Laws by its General Assembly. North Carolina denies all other averments set forth in Paragraph 50 of the Complaint.

51. North Carolina admits the averments set forth in Paragraph 51 of the Complaint upon information and belief.

52. North Carolina admits that the Commission, in a letter dated November 8, 1999, gave notice of a "formal, quasi-judicial sanctions hearing" to be held by the Commission on December 8, 1999.

53. North Carolina admits that its Attorney General, in a letter dated December 1, 1999, informed the Commission that it had no authority to conduct a sanctions proceeding against a State that had voluntarily withdrawn from the Compact, that North Carolina would not participate in the sanctions proceeding, and that North Carolina would vigorously oppose any effort by the Commission to impose sanctions or retain further jurisdiction over North Carolina. North Carolina denies all other averments set forth in Paragraph 53 of the Complaint.

54. North Carolina admits, upon information and belief, that the Commission held a "Sanctions Hearing" on December 8, 1999. North Carolina denies all other averments set forth in Paragraph 54 of the Complaint.

55. North Carolina admits that, in a "Resolution" adopted December 9, 1999, the Commission purported to impose monetary sanctions against North Carolina and to require payment to the Commission of such monetary sanctions in full by July 10, 2000. North Carolina denies all other averments set forth in Paragraph 55 of the Complaint.

56. North Carolina admits that it did not comply with the terms set forth in the "Resolution" adopted by the Commission on December 9, 1999. North Carolina denies all other averments set forth in Paragraph 56 of the Complaint.

57. North Carolina admits the averments set forth in Paragraph 57 of the Complaint.

58. North Carolina admits the averments set forth in Paragraph 58 of the Complaint.

59. North Carolina admits that the "Brief for the United States as Amicus Curiae" was submitted in May 2001 in response to the order of the Court inviting the Solicitor General to express the views of the United States on the Commission's Motion for Leave to File Bill of Complaint. North Carolina denies all other averments set forth in Paragraph 59

of the Complaint for the reason that the "Brief for the United States as Amicus Curiae" speaks for itself.

60. North Carolina admits the averments set forth in Paragraph 60 of the Complaint.

61. North Carolina denies the averments set forth in Paragraph 61 of the Complaint.

COUNT I - VIOLATION OF MEMBER STATES' RIGHTS UNDER THE COMPACT

62. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 61 as though fully set forth herein.

63. North Carolina admits that the Compact is an agreement among its member States that was consented to by the United States Congress. North Carolina denies all other averments set forth in Paragraph 63 of the Complaint.

64. North Carolina admits that in 1986 it was designated as the second host State for the Compact, and promptly began taking actions necessary to site, license, construct, and operate a regional disposal facility, including the creation of necessary State agencies and the provision of funding from North Carolina's treasury. North Carolina denies all other averments set forth in Paragraph 64 of the Complaint.

65. North Carolina denies the averments set forth in Paragraph 65 of the Complaint.

COUNT II - BREACH OF CONTRACT

66. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 65 as though fully set forth herein.

67. North Carolina admits that the Compact is an agreement among its member States that was consented to by the United States Congress. North Carolina denies all other averments set forth in Paragraph 67 of the Complaint.

68. North Carolina denies the averments set forth in Paragraph 68 of the Complaint for the reason that the Compact speaks for itself.

69. North Carolina denies the averments set forth in Paragraph 69 of the Complaint.

70. North Carolina denies the averments set forth in Paragraph 70 of the Complaint.

COUNT III - UNJUST ENRICHMENT

71. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 70 as though fully set forth herein.

72. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accord with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 72 of the Complaint.

73. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accord with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 73 of the Complaint.

74. North Carolina denies the averments set forth in Paragraph 74 of the Complaint.

75. North Carolina denies the averments set forth in Paragraph 75 of the Complaint.

COUNT IV - PROMISSORY ESTOPPEL

76. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 75 as though fully set forth herein.

77. North Carolina admits that in 1986 it was designated as the second host State for the Compact, and promptly began taking actions necessary to site, license, construct, and operate a regional disposal facility, including the creation of necessary State agencies and the provision of funding from North Carolina's treasury. North Carolina denies all other averments set forth in Paragraph 77 of the Complaint.

78. North Carolina denies the averments set forth in Paragraph 78 of the Complaint.

79. North Carolina denies the averments set forth in Paragraph 79 of the Complaint.

80. North Carolina denies the averments set forth in Paragraph 80 of the Complaint.

COUNT V - MONEY HAD AND RECEIVED

81. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 80 as though fully set forth herein.

82. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accordance with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 82 of the Complaint.

83. North Carolina admits that funds generated by fees and surcharges imposed on generators disposing waste at the

Barnwell facility were provided by the Commission to the Authority in furtherance of the effort to develop a regional waste disposal facility to serve generators and the Compact's member States and to equitably distribute the costs of such effort among the party States in accordance with the stated policy of the Compact. North Carolina denies all other averments set forth in Paragraph 83 of the Complaint.

84. North Carolina admits that the Authority, upon recommendation of CNSI, selected a proposed site for the regional disposal facility, that CNSI submitted a license application to construct and operate a facility at the proposed site, that DRP began review of the license application, that due to inadequacies in the license application and the geologic complexity of the proposed site approval was delayed and much additional scientific analysis was required, and that the entire process stopped prior to completion of the disposal facility when the Commission refused to authorize additional funding. North Carolina denies all other averments set forth in Paragraph 84 of the Complaint.

85. North Carolina denies the averments set forth in Paragraph 85 of the Complaint.

86. North Carolina denies the averments set forth in Paragraph 86 of the Complaint.

87. North Carolina denies any and all averments set forth in any unnumbered paragraph in the Complaint as well as any and all averments set forth in the Prayer for Relief in the Complaint.

AFFIRMATIVE DEFENSES

88. North Carolina incorporates each and every admission, denial, and averment made by North Carolina in Paragraphs 1 through 87 as though fully set forth herein. North Carolina asserts separately and/or alternatively, even if inconsistent, the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

89. The Plaintiffs have failed to state a claim upon which relief can be granted because North Carolina's withdrawal from the Compact terminated North Carolina's obligations and divested the Commission of jurisdiction to issue sanctions against North Carolina as it was no longer a party State.

SECOND AFFIRMATIVE DEFENSE

90. The Commission is not a proper party to this suit and its claims against North Carolina are barred by North Carolina's sovereign immunity. The enactment of the Compact contained an express reservation of North Carolina's sovereign rights; therefore, as to the Commission, the Complaint must be dismissed because North Carolina did not waive its sovereign immunity and consent to suit by the Commission by virtue of its enactment of the Compact.

THIRD AFFIRMATIVE DEFENSE

91. The Plaintiffs have failed to state a claim upon which relief may be granted because the sanctions imposed by the Commission were *ultra vires*. The sanction authority of the Commission established in the Compact pertains only to suspension or termination of the rights of a party State. The Compact does not authorize the Commission to impose monetary penalties against a party State.

FOURTH AFFIRMATIVE DEFENSE

92. The Plaintiffs have failed to state a claim upon which relief may be granted because recovery for the loss of anticipated future revenues is wholly speculative and there is no legal basis for the recovery of attorney's fees from North Carolina.

FIFTH AFFIRMATIVE DEFENSE

93. The Plaintiffs' claims are barred, in whole or in part, because all damages sought as a result of a purported breach of contract are barred by the applicable statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

94. The Plaintiffs' claims are barred, in whole or in part, by the doctrine of estoppel. Funds provided by the Commission to the Authority in furtherance of North Carolina's attempt to develop the Compact's second regional low-level radioactive waste disposal facility were not retained by North Carolina but instead were used to reimburse various third parties for work done based upon the submission of invoices that were reviewed and approved by the Commission before payment. The various third parties that received such payments are not present in this action.

SEVENTH AFFIRMATIVE DEFENSE

95. North Carolina had an explicit right under the Compact to "regulate and license" any low-level radioactive waste disposal facility to be sited within its borders without interference from the Commission or any party State. North Carolina's inability to issue a license for construction and operation of the regional disposal facility did not breach any duty owed to the party States where the applicant had not yet demonstrated that the facility could be operated at the proposed site without negative impacts on public health and safety and the environment.

EIGHTH AFFIRMATIVE DEFENSE

96. The funds provided to North Carolina were collected solely from the generators of waste disposed at the Barnwell facility; therefore, the money belongs neither to the Commission nor to the Plaintiff States. To allow them to recover the money would result in unjust enrichment of the Plaintiffs.

NINTH AFFIRMATIVE DEFENSE

97. The Plaintiffs have failed to state a claim upon which relief can be granted because neither the statutes nor the common law of North Carolina recognizes a claim for "money had and received."

TENTH AFFIRMATIVE DEFENSE

98. If the Court determines that North Carolina's failure to provide a regional disposal facility breached North Carolina's agreement with the Plaintiff States, North Carolina alleges that there was "frustration of purpose" of the agreement. North Carolina's duty to perform was discharged because, after the formation of the agreement and North Carolina's designation as the second host State, South Carolina withdrew from the Compact and continued operating the Barnwell facility, frustrating the shared expectation of all party States that the regional disposal facility in the second host State would operate as a monopoly and depriving North Carolina of the guaranteed waste stream necessary to operate the facility, thereby destroying the value of the agreement.

ELEVENTH AFFIRMATIVE DEFENSE

99. North Carolina was required by statute to withdraw from the Compact if it determined that any member State was not acting in good faith in complying with all of the terms of the Compact. South Carolina's withdrawal from the Compact and continued operation of the Barnwell facility outside of the Compact for the benefit of generators nationwide while excluding waste from generators located in North Carolina and the complicity of the Commission and the other party States in failing to challenge South Carolina's conduct as a violation of the Compact demonstrated that the member States were not acting in good faith to comply with all the terms of the Compact, thereby requiring North Carolina to withdraw.

TWELFTH AFFIRMATIVE DEFENSE

100. Plaintiffs' claims are barred, in whole or in part, by the "reserved powers" doctrine, which provides that a State Legislature may not contract away the police power of the State. Regulation of the health and safety of North Carolina's residents and protection of the environment are core police power functions. The determination of North Carolina's agencies responsible for the environment and for health and safety constitute executions of police power for which North Carolina cannot be held liable.

PRAYER FOR RELIEF

WHEREFORE, North Carolina respectfully prays that the Court:

1. Dismiss the Complaint with prejudice; and

2. Grant such costs and expenses to North Carolina as allowed by law or as the Court deems just and proper.

Respectfully submitted,

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